

NZETS & FOREST LAND - THE NEW 'BUYER BEWARE'

The New Zealand Emissions Trading Scheme ("NZETS") is now in force and raises serious issues for prospective purchasers of any land containing forest land. In short, every prospective purchase of any land containing trees, and everyone involved in the process, must be aware that they may unwittingly take on significant liabilities under the NZETS.

What is the liability?

If forest land falls with NZETS, the liability is that if you deforest the land and you do not replant to specified thresholds, you must surrender carbon credits or to pay a cash equivalent. This may be significant if the market price of carbon rises. 'Deforest' includes any change in the use of the land, which may mean harvesting the trees, or converting the land to dairy farming or pasture.

This liability stays with the land, not the landowner. As a result, a purchaser of land containing forest land may take on these liabilities.

Under the NZETS, a forest can automatically be caught due to the age, species and size of the forest. Forest land needs to be only one hectare in size. There are two types of forest land under the NZETS.

Pre-1990 Forest land

Pre-1990 forest land means forest that was planted before 31 December 1989 and remained planted until 31 December 2007. Owners of pre-1990 forest land are automatically in the NZETS. Owners of pre-1990 forest land cannot earn carbon credits and face a significant liability if they deforest.

For pre-1990 land, the liability arises when you deforest more than 2 hectares in any 5 year period from 1 January 2008. The obligation is to replant. The liability if you fail to do so lies with the landowner. This may mean that in a sale, the new owner will take on this liability, not the previous landowner who deforested the trees.

This is difficult for forest land that is in its second or third forestry rotations. For example, if you buy land that contains pre-1990 forest land you will need to consider whether the price for the harvest will cover your NZETS liability. This may significantly limit your options to use your land.

The vendor of pre-1990 forest land may not be aware that it is caught by the NZETS. It may also not be registered against the Certificate of Title. The obligation is on the purchaser to investigate what they are buying and the risks they are taking on.

Post 1989 Forest Land

Post-1989 forest land means forest land that was planted after 1 January 1990. Land owners of post-1989 forest land have the option of entering the NZETS and can earn and sell carbon credits.

For post-1989 forest land, the liability arises when you deforest your land and do not replant. If you have deforested, you are liable to pay back the carbon credits you have earned. The amount payable is determined when you file your annual emissions return and the carbon in your forest is calculated.

If an owner of post-1989 forest land has joined the NZETS voluntarily, this will be registered against the Certificate of Title. This must be considered in all land purchases as the new purchaser will take on these obligations and liabilities upon ownership.

A purchaser could require the vendor to remove the land from the NZETS as a condition of the agreement. Alternatively, the purchaser may negotiate a lower purchase price to cover the NZETS liability.

Buyer (and vendor, lender, valuer....) beware

All circumstances are different and you must do your homework. This applies to lenders, vendors, valuers, purchasers and any person involved in the sale and purchase process.

For example, where land is purchased by finance, the lender must be aware of the risks should the purchaser forfeit on the mortgage after selling the carbon credits. The NZETS liability to pay back the carbon credits will transfer back to the lender.

It is important to be aware of these issues when looking at a potential purchase of any land. All prospective purchasers of land containing forest land must carry out a thorough investigation to determine any obligations and liabilities under the NZETS.

Sharp Tudhope Lawyers can advise on NZETS issues on the sale and purchase of land.

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